

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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Millennium Pipeline Company, L.P.,

Appellant,

against --

The State Of New York, Department of State,

Respondent.

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AMICUS BRIEF AND COMMENTS OF THE TOWN OF CORTLANDT, NEW YORK
IN SUPPORT OF THE OBJECTION OF THE NEW YORK STATE
DEPARTMENT OF STATE TO THE MILLENNIUM PIPELINE PROJECT

PRELIMINARY STATEMENT

Pursuant to the August 20, 2002 Order (the "August 20 Order") of the Secretary of Commerce of the United States of America (the "Secretary"), the Town of Cortlandt (the "Town") submits this brief and these comments as "Friend of the Secretary" in support of the May 9, 2002 objection of the New York Department of State (the "DOS Objection") to the consistency certification for the proposed Millennium Pipeline Project (the "Pipeline").

The Town agrees with the arguments made by the Department of State ("DOS") in its October 16, 2002 brief (the "DOS Brief"), as well as those in the Amicus Briefs of the City of New York and the Village of Croton-on-Hudson, New York in support of the DOS Objection, and submits that the alternatives discussed in the DOS Brief should be fully reviewed in

accordance with the National Environmental Policy Act (“NEPA”).¹ Therefore, in accordance with the Secretary's August 20 Order, rather than restating in depth the arguments in those memoranda, the Town offers this Amicus Brief as a supplement to them.

DOS correctly found that the Millennium Pipeline Company, L.P. (“Millennium”)’s Pipeline is entirely inconsistent with the Coastal Zone Management Act (“CZMA”).² If constructed as proposed, the Pipeline would seriously threaten the electric power and water-supply systems that are the life support for million of New York’s coastal-zone residents. Coupled with the disruption that the Pipeline would cause to the Indian Point Nuclear Plant (“Indian Point”) evacuation network, this “perfect storm” of impacts could devastate human life, natural resources and the economic vitality of the New York City (the “City”) and Westchester County coastal zone.

Despite these severe coastal-zone consequences, Millennium appeals to the Secretary to override the DOS Objection and find that the Pipeline is consistent with the CZMA’s purposes. As discussed below, that appeal is without merit.

Millennium’s procedural challenge fails because DOS issued its Objection within six months of Millennium’s submission of all information necessary to undertake its review, and because any delay is attributable solely to Millennium. Indeed, after misleading the public and all involved agencies during the two-year environmental review of the Pipeline under NEPA process, it was only in November 2001 – after the Federal Regulatory Commission (“FERC”) completed the Final Environmental Impact Statement (“FEIS”) for the Pipeline – that Millennium revealed it would blast up to 400 feet in Haverstraw Bay before making landfall in

42 U.S.C. § 4321 et seq.

² 16 U.S.C. § 1451 et seq.

the Town. Because this was entirely “new information”³ that directly contradicted the existing Federal Water Pollution Control Act (the “Clean Water Act” or “CWA”)⁴ Section 401⁵ Water Quality Certification (“WQC”) incorporated in the FEIS, DOS could not have “commenced” its review of Millennium's proposed Haverstraw Bay “blasting” method with receipt of the FEIS, since Millennium did not identify its method until nearly two months later. DOS then timely completed its review of the Haverstraw Bay crossing by May 9, 2002 – within the statutory six-month period.⁶

Aside from its defective procedural challenge, Millennium raises two equally unpersuasive substantive challenges under 15 C.F.R. § 930.120: first, that the Secretary should override the DOS Objection because the Pipeline is “consistent with the objectives or purposes” of the CZMA (“Ground I”), and second, that an override is appropriate because the Pipeline “is necessary in the interest of national security” (“Ground II”). As the Record demonstrates, neither ground provides a basis upon which the Secretary may grant an override.

Millennium fails to carry its heavy burden on the Ground I challenge. Millennium’s heavy reliance on the fact that FERC already has issued a certificate of public convenience and necessity (the “Certificate”) for the Pipeline, is entirely misplaced. The Certificate’s issuance itself violates the CZMA, which prohibits a federal agency from licensing or permitting any

³ See FERC Interim Order, dated December 19, 2001 (the “Interim Order”) (attached as Exhibit 1 to Millennium's Initial Brief On Appeal, dated August 12, 2002 (the “Millennium Br.”), at 64.

⁴ 33 U.S.C. § 1251 et seq.

⁵ 33 U.S.C. § 1341(a)(1).

⁶ 15 C.F.R. § 930.62(a).

activity until a state concurs with the consistency determination.⁷ While the Town agrees with Millennium that this is a “unique” circumstance, the Town draws a diametrically-opposite conclusion from FERC’s conduct: rather than supporting Millennium’s appeal, the fact that FERC prematurely issued the Certificate – itself a violation of the CZMA’s plain terms – supports the DOS Objection.

But even setting aside its reliance on the illegal Certificate, Millennium’s appeal fails on the first “Ground I” element. Ignoring the text of the regulation and instead offering only the most circular of arguments, Millennium contends that the Pipeline furthers a national interest because the Pipeline is “a major energy facility,” and because the CZMA states as a national objective the “siting of major facilities related to...energy.” This oversimplified argument supposes that every proposed pipeline must be approved simply for the sake of building a pipeline, and ignores the regulation’s qualitative mandate that such a facility must further the national interest “in a significant or substantial manner.” Millennium sidesteps all of the qualitative factors – such as the threat of terrorism and lack of data showing either demand or supply for the Pipeline – which demonstrate that this particular Pipeline is not at all “in the national interest.”

Examination of the Record reveals that the Pipeline’s alleged benefits – such as contributing to “energy self-sufficiency” and supplying fuel to coastal zone power plants – are not only speculative, but illusory. In fact, Millennium fails to demonstrate either an actual demand or a suitable supply of natural gas. While Millennium claims that the Pipeline will foster economic development, more than 75% of gas to be delivered by Millennium has been subscribed under “precedent agreements” with its own partners and affiliates, and not a single

⁷ See 16 U.S.C. § 1456(c)(3)(A).

“coastal zone” end-user has been identified. While this amply demonstrates Millennium's Enron-like ability to conjure up a phantom “market” for its gas, it does little to justify the Pipeline as being in the “national interest.” Moreover, since Millennium’s Canadian “partners” abandoned this project last year, the Pipeline has no source of gas to “supply” to the United States. But even assuming for the sake of argument that the Pipeline does further a significant or substantial national interest, Millennium cannot demonstrate that this outweighs the well-documented and potentially-catastrophic adverse coastal effects the Pipeline would cause.

Millennium proposes to run miles of the Pipeline within 50 feet of the Consolidated Edison (“ConEd”) high-voltage power lines that supply New York City with 40% of its electricity, much of which will have to be blasted through granite bedrock; to cross less than three feet above the aqueduct that provides nine million New Yorkers with nearly half their drinking water; and to repeatedly cross the road network that serves as the primary emergency-evacuation system for Indian Point.

Since the September 11, 2001 terrorist attacks on New York and Washington, the federal government has repeatedly warned that terrorists are probing the nation’s energy and water infrastructure in a search for future targets, and the media have widely reported specific threats to Indian Point and the City's water-supply system. While the Town will not detail the ways in which individuals could use the Pipeline to do harm to the City, suffice it to say that running the Pipeline so close to critical infrastructure could have devastating “adverse coastal affects” – as a result of either terrorism, natural disaster or accident – that far outweigh any conceivable ‘national interest.’

The Secretary must also consider the potential harm to the coastal zone from the miles of blasting on the ConEd right-of-way (“ROW”) required for the Pipeline trench. That blasting

would severely impact the dozens of homeowners who live adjacent to the ConEd Offset/Taconic Alternative (the “Taconic Alternative”) route, by potentially destroying house foundations, septic systems and other infrastructure, and causing injury or death to people by razor-sharp fly rock ejected by such blasting. Moreover, blasting on the ConEd ROW could send clouds of dioxin-bearing rock dust into the homes, water supplies and lungs of residents along the ROW. Millennium incorrectly contends that the Taconic Alternative routing is located outside the coastal zone; in fact, this area is squarely within the defined boundaries of New York’s coastal zone. Because these homeowner impacts occur entirely within the coastal zone, they must be considered as adverse coastal impacts and weighed against the Pipeline’s alleged benefits to the “national interest.”

In fact, despite contrary assertions by Millennium, even where the Pipeline’s routing is outside of the coastal zone, it still implicates CZMA concerns. The CZMA and New York’s Coastal Management Program (“CMP”) not only allow but mandate that DOS, and the Secretary, take into account activities regardless of whether they occur “within or outside the coastal zone” if they “affect any land or water use or natural resource of the coastal zone....” The CZMA thus requires the Secretary to consider as “adverse coastal effects” the threat to the City from the potential simultaneous interruption of much of its power and drinking-water supply, and to the Town from losing its Indian Point evacuation routes.

The Secretary also cannot override the DOS Objection because the Pipeline’s phosphorus impacts on the New Croton Reservoir will violate the CWA. The Reservoir is an unfiltered-water source for 900,000 New Yorkers per day and, in the event of emergency, is earmarked as the drinking-water source for over two million people. Given the Reservoir’s sensitivity to nonpoint pollution sources, the New York State Department of Environmental Conservation

(“DEC”) has promulgated (and the U.S. Environmental Protection Agency (“EPA”) has approved) heightened-protection criteria for the Reservoir, which prohibit any additional nonpoint-phosphorus contributions. The Pipeline’s construction would violate these federal water-quality criteria and thereby be inconsistent with the CZMA.

Millennium cannot satisfy the third Ground I element because, contrary to its self-serving conclusions, there are reasonable alternatives to the Pipeline that would permit the City's energy needs to be met in a manner that is consistent with New York's CMP. In addition to the multiple alternatives thoroughly evaluated in the DOS Objection and the DOS Brief, the FEIS recognized that the Eastchester Expansion project “could serve the New York City area providing similar pipeline capacity” as the Millennium Pipeline.⁸ DOS already has found that the Eastchester Expansion project is consistent with the State's CMP, and it is already being built. Moreover, the proposed Northeast ConneXion Pipeline project would provide the same volume of gas to the City, connect with ConEd's distribution system on Manhattan's west side (within the coastal zone), and cross the Hudson River below any critical-fisheries habitat (such as Haverstraw Bay). Most importantly, these Pipeline alternatives come nowhere close to the critical electric, water supply and Indian Point evacuation routes that, if disrupted, could cause catastrophic consequences within the coastal zone, and to the greater metropolitan area as a whole.

Finally, Millennium has not come close to satisfying its Ground II burden, which requires it to demonstrate that “a national defense or other national security interest would be significantly impaired” if the Pipeline was not permitted to go forward as proposed.⁹ No federal agency has opined that the Pipeline is “necessary” for the nation’s security, and the Secretary’s

⁸ FEIS (attached as Exhibit 2 to the Millennium Br.) at 3-39.

⁹ 15 C.F.R. § 930.122.

previous consistency decisions make clear that Millennium's boilerplate, generalized arguments – that the Pipeline will decrease “reliance upon energy supplies from insecure sources” and “encourage the development of secure North American energy resources” – are inadequate to meet its burden.

In sum, the risks that the Pipeline poses to the New York City and Northern Westchester coastal zone far outweigh any of the Pipeline's undocumented potential benefits. And these risks are particularly unwarranted when there are other reasonable alternatives that would avoid them completely. The Town therefore joins in the DOS Objection's conclusion that the Pipeline is inconsistent with many policies in New York's CMP. “The requirement of consistency with federally-approved state coastal zone management programs is not one to be dismissed lightly,” and in this instance Millennium has not met its heavy burden for the Secretary doing so. Accordingly, the DOS Objection should be left to stand.

¹⁰ FEIS at 1-1.

¹¹ Where documents or other authority cited by the Town are publicly available on the internet, the Town refers to the appropriate website address for the document. Moreover, most every document cited herein may be retrieved on FERC's FERRIS system, accessible at www.ferris.ferc.gov, under docket number CP-98-150-000. By utilizing this citation method, the Town hopes to reduce the amount of paper generated by this appeal, and to further complement the Secretary's electronic facilitation of these proceedings. However, in the event the Secretary

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